Numerica Savings Bank, F.S.B.

v.

City of Nashua

Docket Nos.: 5976-89 and 8149-90

DECISION

The "Taxpayer" appeals, pursuant to RSA 76:16-a, the "City's" 1989 and 1990 assessments of $2,604,800 (land, $435,900; buildings, $2,168,900) on Map 77Q, Lot 13Q, consisting of a vacant retail center and warehouse (the Property). For the reasons stated below, the appeal for abatement is granted.

The Taxpayer has the burden of showing the assessments were disproportionately high or unlawful, resulting in the Taxpayer paying an unfair and disproportionate share of taxes. See RSA 76:16-a; Tax 201.04(e); Appeal of Town of Sunapee, 126 N.H. 214, 217 (1985). We find the Taxpayer carried this burden and proved disproportionality.

The Taxpayer argued the assessments were excessive because:

(1) estimates by the income and cost approaches to value were less than half of the indicated equalized values;

(2) the City's 1992 revaluation value of $1,347,400, was significantly less than the Property's 1989 and 1990 equalized value;

(3) the building has significant water damage due to a leaky roof;

4) the building and its various components have significant deferred maintenance;

(5) the Property was an old mill building converted to retail uses in 1985, which use proved to be unsuccessful;

(6) the Property is located in the 100-year floodplain and thus would not have received approvals for residential uses;

(7) there was structural damage to the building's slab and support columns;

(9) the buildings are located in the bowels of the millyard with the only access through other mill property because the Nashua River runs on three sides of the Property;

(10) Public Service Company has a powerline easement across the parking lot; and

(11) the Property was foreclosed in 1989 for the amount of the outstanding loan ($4,100,000); a purchase and sales agreement was signed but not consummated in 1989 for $3,100,00; and the property was sold in June 1992 for $500,000.

The City argued the assessments were proper because:

(1) the Taxpayer provided the City with an appraisal report by Northern Appraisal Assoc. that estimated the market value as of February 1988 of $7,350,000 (Exhibit City-C);

(2) this appraisal report and the City's opinion of the highest and best use of the property was as a potential residential development;

(3) the City has never received a completed application for residential use of the Property nor has it received an engineering study delineating the actual floodplain;

(4) the Property's 1992 sale for $500,000 was not indicative of its market value in 1989 and 1990; and

(5) the Taxpayer did not submit any evidence of the general level of assessment for 1989 and 1990.

Board's Rulings

Based on the evidence, we find the correct assessments should be $1,290,000 for 1989 and 1990.

This assessment is ordered because:

1) the Northern Appraisal Assoc. appraisal relied upon by the City to justify the assessment was not

credible for the following reasons:

A) the appraisal assumed the highest and best use of the property was for multi-family, residential development despite the substantial evidence of flooding and the public safety concerns of emergency vehicles accessing the site;

B) the appraisal relied solely on the direct-sales-comparison approach, but the sales used occurred in 1985 and 1986 and were too dated to provide a reliable indication of the 1989-1990 market value; and

C) the appraisal based all its analysis and estimates of value on 282,867 square feet of gross building area when all other evidence submitted by the parties estimated the square footage of the building to be 80,000 to 130,000 square feet less than that figure;

2) the City was unable to explain the assessment other than state it was calculated during the 1981

revaluation with the land appraised at commercial values and the building estimated by the cost approach

with substantial depreciation;

3) this Property has serious locational and physical problems:

A) the Property is located in an oxbow of the Nashua River with poor access from downtown and with no visibility;

B) parts of the Property are in the flood-hazard zone and would be difficult and expensive to develop;

C) a 135-foot-wide, powerline easement bisects the Property; and

D) the building is oversized, dysfunctional and in poor physical condition.;

4) while not conclusive evidence of market value, the Property has exhibited a declining pattern of value indicators:

A) investment of $4,500,000 in 1985 for renovations;

B) foreclosure in February 1989 for $4,100,000;

C) offer to purchase in October 1989 of leasehold interests for $3,100,000; and finally,

D) sale of the property by FDIC through its agent, Banc One, for $500,000 in June 1992; and the assessments equalized by the 1989 and 1990 equalization ratios (43% and 47%) indicate market values of $6,057,700 and $5,542,100.

The above factors, coupled with the board's expertise clearly establish overassessment. The evidence also established the Property's highest and best use was as industrial space.

The Taxpayer's evidence was the best evidence from which the board could derive an adjusted assessment. The Taxpayer's income approach was somewhat terse, but the City agreed the rent for industrial space was accurate. Therefore, we have set the assessments at $1,290,000. The board, however, based on its judgment thinks the $1,290,000 figure is probably still too high, but we do not have sufficient supporting information to support a lower assessment.

Equalization Ratios

The City argued the board could not use the department of revenue administration's (DRA) equalization ratios because: 1) the ratios are statistically invalid; and 2) the Taxpayer did not provide evidence to support the ratios. Concurrent with this argument, the City argued the Taxpayer did not provide any evidence concerning the general level of assessments, and therefore, the board should deny the Taxpayer's appeals.

The board has already addressed this specific issue in Birch Pond Office Park Association v. City of Nashua, Docket Nos. 4246-88 and 5894-89 and in New England Life Insurance Company v. City of Nashua, Docket No. 8471-90. The board incorporates in this decision pages 8-13 of those decisions, excluding the specific calculations found on page 13. (Copy of decisions attached.) Some of the discussion below reiterates and reinforces the board's earlier conclusions.

Equalization Ratios Statistically Unacceptable

The City argued the equalization ratios were statistically unacceptable because:

1) the DRA's ratio studies were based on unrepresentative samples because the percentage of sales, by property class, used in the studies did not mirror the actual percentage of properties in each class existing in the City;

2) the sample sizes were inadequate;

3) the sales used in the studies were not time adjusted to April 1 of the subject years; and

4) the DRA did not verify all of the sales used in the studies.

The board reviewed the City's analyses and its testimony. The board rejects the City's conclusion that the ratio studies are so flawed that the ratios must be rejected. First, despite its criticism of the ratio studies, the City has acknowledged the DRA ratios were not far from the ratios that would have been calculated if the DRA had completed a statistically acceptable analysis. Second,the board reviewed the City's analyses of the studies, using the International Association of Assessing Officers, Standard on Ratio Studies (1990). While the DRA's studies may not have complied precisely with the IAAO's standards, the studies were not so flawed as to be rejected.

In response to the City's specific arguments, we make the following observations. See also the Birch Pond decision.

1) Representativeness.

The IAAO standards do not require absolute identity between the sample, i.e., properties used in a study, and the population, i.e., the properties existing in a municipality. As stated in section 5.5 of the IAAO standards:

In general, a ratio study is valid to the extent the sample is **representative** of the population.

> Ideally, the sample would mirror the population exactly. Operationally, representativeness is achieved when (1) appraisal procedures used to value the sample parcels are similar to procedures used to value the rest of the population, (2) sample properties are not unduly concentrated in certain areas or types of property that have been appraised differently from other properties in the population, and (3) sales or independent appraisals provide good surrogates for market values.

Therefore, we reject the City's argument that the ratio studies were flawed because the samples were unrepresentative.

2. Sample size.

The City critiqued the DRA's sample sizes, but the City's conclusions did not show the sample sizes were inadequate.

3. Time adjustment.

The City criticized the DRA's failure to time adjust the sales used in the study to April 1 of the subject years. While the IAAO does suggest time adjusting to a particular date, it is not a critical flaw in this case.

4. All sales not verified.

The City criticized the DRA's ratio studies because all of the sales used in the studies were not verified. Again, while the IAAO suggests that all sales be verified, we do not think the DRA's failure to verify all sales was a critical flaw. In the 1989 study, 70% of the sales were verified, and in the 1990 study, 71% of the sales were verified.

General Level of Assessment

The City also argued the equalization ratios could not be used by the board because the City did not stipulate to the ratios and the Taxpayer failed to provide evidence to support the equalization ratios or to demonstrate the City's general level of assessment. We reject the City's position. Initially, we direct the parties to the Birch Pond decision for the board's response to this argument. Furthermore, we direct the parties to Dickerman v. Nashua, Docket No. 7273-89 and 8584-90. The board took official notice of that hearing. See RSA 541-A:18 V.

During the Dickerman hearing, the City testified the last general revaluation occurred for the 1981 tax year. From 1981 to 1989 and 1990, the City made only two adjustments to property assessments in the City: 1) adjusted the assessments on commercial properties along the Daniel Webster Highway; and 2) adjusted the assessments on condominiums (1989). With the exception of these two adjustments, the City made no studies or adjustments to assessments based on relative changes in the market. In other words, the assessments now under appeal were derived from 1981 market data with one adjustment even though the market changed dramatically from 1981 to 1989 and 1990.

Obviously the City's failure to annually review assessments raises several questions concerning proportionality, which the City cannot answer. The specific question now being whether the appealed properties were equitably assessed. At the Dickerman hearing, the City admitted it did not know whether the appealed assessments were proportional or not. Mr. Fedele, the City's assessor, admitted that using the 1981 market and cost data may not result in proportional assessments in 1989 and 1990. Mr. Fedele said:

> Whether that's [the method used by the City] proportional or not, the City really has no idea at any point whether an assessment is proportional in that regards. We really don't. It becomes a matter of whether a taxpayer brings in information relative to the proportionality of an assessment that the City then goes back and reviews that information in that regards.

Additionally, Mr. Rousseau, the City's assessment manager, agreed the City is required to have an understanding of the general level of assessment within the City. Unfortunately, the City did not and does not have an understanding of the general level of assessment in the City for 1989 and 1990.

Based on the evidence presented, including the City's admissions, the board concludes the City has not complied with its obligations to ensure proportional assessments. Birch Pond discussed the law concerning these obligations. Having failed to fulfill its obligations, the City cannot now stonewall the Taxpayer's who have shown overassessment by equalizing the assessments with the applicable equalization ratios and then comparing those equalized values with the fair market value evidence.

One factor underlying this decision is the reality that ratios studies require a significant effort and expense. The same is true for reviewing and supporting the DRA's study. At the Dickerman hearing, the City acknowledged that performing ratio studies was an onerous task - - too onerous for municipalities and too onerous for taxpayers. Specifically, the reason the City had not done an annual

study was because it would have been too onerous. The City testified the task was too burdensome because the City's assessment system from 1981-1992 was not computerized. If the task is burdensome for municipality, then certainly it would be prohibitive for all but the wealthiest taxpayers.

Conclusion

If the taxes have been paid, the amount paid on the value in excess of $1,290,000 for 1989 and 1990 shall be refunded with interest at six percent per annum from date paid to refund date. RSA 76:17-a.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Paul B. Franklin, Member

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Ignatius MacLellan, Esq., Member

CERTIFICATION

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to Numerica Savings Bank, F.S.B., Taxpayer; and Chairman, Board of Assessors of Nashua.

Dated: December 30, 1992

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Valerie B. Lanigan, Clerk

Numerica Savings Bank, F.S.B.

v.

City of Nashua

Docket Nos.: 5976-89 and 8149-90

ORDER

On January 12, 1993 the board of tax and land appeals (board) received a motion for rehearing (motion) from the City raising two issues:

1) the board erred in granting an abatement because the Taxpayer failed to establish the general level of assessment in the City and thus did not prove that it was disproportionally assessed; and

2) the board erred in refusing to allow the City to cross examine the Taxpayers' witnesses.

On May 11, 1993 the board received a letter from the City indicating they were withdrawing the issue of cross examination from their motion for rehearing.

The board denies the motion for rehearing and responds further to the remaining issue of disproportionality in three areas:

1) the city's assessment shortcomings;

2) RSA 76:17-b; and

3) the city's assessment responsibilities.

Assessment shortcomings

The board is astonished and incredulous that the City wishes to have a rehearing and possibly appeal the decision in this case where the facts are so clear that the City did not attempt to fulfill their assessing responsibilities under RSA 75:1 and RSA 75:8. As the board stated in its "decision" of December 30, 1992, the appraisal the City relied on for its defense was flawed for several reasons: 1) it assumed an incorrect highest and best use for the Property; 2) it relied on an appraisal that used outdated sales; and 3) it overstated the square footage of the building by between 39% and 85%. Further, the assessment under appeal was flawed because: 1) the City was unable to explain how the assessment was derived in 1981; 2) it had not taken into consideration the serious locational and physical problems of the Property; and 3) it had not been reviewed in light of the various financial transactions that had occurred with the Property from 1985 through to 1989. Given these gross assessing shortcomings, the board is perplexed why the City wishes to continue to defend its incompetency and not comply with state law.

RSA 76:17-b

Before addressing the general level of assessment issue, the board must note an amendment (RSA 76:17-b) made by the Legislature in 1990, which reads "whenever, after taxes have been paid, the board of tax and land appeals grants an abatement of taxes because of an incorrect tax assessment due to a clerical error, or a plain and clear error of fact, and not of interpretation, as determined by board of tax and land appeals, the person receiving the abatement shall be reimbursed by the city or town treasurer for the filing fee paid under RSA 76:16-a, I."

This amendment reflects the Legislature's intent that taxpayers should not have to file an appeal with the board of tax and land appeals where there is a clear and substantial error of fact as there is in this case.

City's assessment responsibilities

The issue of whether the board erred in using the state's equalization ratio without requiring Numerica to produce its own evidence of the general level of assessment has been addressed in the board's decision in this case and in the decisions that were incorporated in the Taxpayer's decision, (Birch Pond, Office Park Association v. The City of Nashua, Docket Nos. 4246-88 and 5894-89 and Dickerman v. Nashua, Docket Nos. 7273-89 and 8584-90). As the City has done in many previous cases, it is attempting to retrospectively throw up this legal stone wall argument as a defense for the gross assessment inequities that could have been kept out through periodic assessment fence mending.

The real issue to be decided is whether the board has authority to grant abatements where the following factors exist:

a) the City failed to comply with its assessing responsibilities -- specifically where the City failed to comply with RSA 75:8, which mandates the yearly review of assessments and market data;

b) the assessment did not consider several important factors (e.g., the correct square footage, the correct highest and best use assumption, the flooding and visibility problems of the Property and the building's poor condition) that affect the Property's value and thus should affect the assessment;

c) the Taxpayer submitted sufficient evidence to raise questions about the assessment as the City concedes in its memorandum of law in support of its motion for a rehearing, page 2; and

d) the full value assessment following a revaluation was substantially less than the equalized assessment

for the appealed years.

Each factor warrants the following brief discussion.

City failed to comply with its assessing duties

Under RSA 75:8, the City was required to annually review all real estate in the City and to make adjustments based on changes to the Properties and changes in the market. The City did not comply with RSA 75:8. In Dickerman v. Nashua, Docket Nos.: 7273-89 and 8589-90, the City testified, with the exception of two situations not applicable here, it did not conduct annual reviews of the assessments or the market. The City even stated it had no idea whether properties in the City were proportionally assessed. These admissions demonstrated the City failed to carry out its RSA 75:8 duties.

The City's failure also violates its constitutional mandate as provided in N.H. Constitution pt. 1, art. 12 and pt. 1, art. 5 (each member of the community is only bound to contribute his/her reasonable and proportional share towards the community). Furthermore, the City has violated N.H. Constitution pt 2, art. 6, which states, "There shall be a valuation of the estates within the state taken anew once in every five years, at least, and as much oftener as the general court shall order." This provision requires full revaluation on a periodic basis to ensure proportionality. Opinion of the Justices, 76 N.H. 588, 595 (1911). In other words, periodic review of assessments is so important, it is embodied in our constitution. These constitutional and statutory mandates are clear, but the City did not comply with them. Nonetheless, the City boldly asks for certain presumptions about the correctness of assessments. Because the City did not comply with its statutory and constitutional mandate, the assessments are not entitled to the normal presumption of correctness that is accorded assessments. We also note that the City's assessment practices do not comply with the assessing function as that function is described by the International Association of Assessing Officials (IAAO). The IAAO, in defining the role of the assessor, states:

The Role of The Assessor

It is hard to overstate the importance of assessors to the administration of the property tax and, indirectly, the vitality of local governments. Appraised values determine the distribution of property tax levies among taxpayers. Only if these values are correct will tax limits, debt limits, and the distribution of state aid to localities be as the legislature intended. Boards of review and boards of equalization can never fully correct poor initial assessments.

A cornerstone of the IAAO and actions of its members is stated in standard one of the IAAO Code of Ethics and Standards of Professional Conduct, which states:

Perform their duties in accordance with applicable laws and regulations and apply them uniformly and fairly. Perform all appraisal and assessment-related assignments to the best of their ability in accordance with the Uniform Standards of Professional Appraisal Practice adopted by IAAO.

We only mention the IAAO because its requirements parallel the requirements of New Hampshire law. We have not based our decision on these IAAO statements, but refer to them as additional material, supporting our conclusion that the City's failure to do its job should not be ignored.

Based on the City's arguments at the hearing and now in the rehearing motion, the City argued its actions in setting the assessments and its failure to comply with the constitution and the statutes is irrelevant. All that matters, according to the City, is the burden of proof. The City asserted it is the Taxpayer's burden to show the error, and the burden is totally independent of the City's responsibilities. The board rejects this approach and this attitude. The City's contempt for the importance of complying with the

constitution and RSA 75:8 is unfathomable and because the City has not complied with its duties, the board will not and has not given the City's assessments the presumption of correctness that assessments

that are arrived at consistent with the constitution and the statutes are entitled to.

Failure to Consider Important Factors

The City is required by law to consider all factors that affect value. See Paras v. City of Portsmouth, 115 N.H. 63, 67-68 (1975). This statement is consistent with RSA 75:1, which requires that assessments be based on market value. See Brock v. Farmington, 98 N.H. 275, 277 (1953). Determining the market value of a particular property requires consideration of all factors that would be relevant to prospective purchasers. The factors raised by the Taxpayer and accepted by the board certainly affect market value, and therefore the assessments should have been adjusted to reflect this point.

Taxpayer's Evidence

The Taxpayer presented credible evidence of matters that affected the Property's value and those factors should have been considered in the assessment. These factors were listed on pages two and three of the decision. Additionally the Taxpayer introduced credible evidence about the Property's difficulty in being leased up and the financial transactions occurring with the Property as listed on page four of the decision. While the board found that the Taxpayer's income approach was somewhat terse, that did not mean that the Taxpayer failed to present any relevant evidence concerning the Property's value.

The 1992 full value assessment

For tax year 1992, the City was revalued and thus had a new full-value assessment (97% according to the department of revenue administrative). The information concerning the Property's new assessment was cumulative and confirmatory evidence of overassessment. The equalized assessment for 1989 and 1990 as compared to the 1992 assessments were as follows.

1989	1990	1992 (without equalization)
$6,057,674	$5,542,128	$1,347,400

Again, the 1992 assessment was so significantly less than the 1989 and 1990 equalized assessments that the new assessment gives some indication that the Property was overassessed in 1989 and 1990.

Therefore for the reasons stated above and the referenced decisions we find the City failed to present any good cause to grant a rehearing. See RSA 541:3.

SO ORDERED.

THE BOARD OF TAX AND LAND APPEALS.

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Paul B. Franklin, Member

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Ignatius MacLellan, Esq., Member

CERTIFICATION

I hereby certify a copy of the foregoing order has been mailed this date, postage prepaid to Gary Stern, representative of Numerica Savings Bank, F.S.B., Taxpayer; and Chairman, Board of Assessors.

Dated:

Valerie B. Lanigan, Clerk